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No. 88-1153

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

W.W. RODGERS AND SONS PRODUCE, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
ROBERT E. LINDSAY
GAIL BRODFUEHRER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals had jurisdiction over petitioners' appeal from an order denying their action for the return of seized property under Federal Rule of Criminal Procedure 41(e).

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A2) is reported at 857 F.2d 790 (Table). The opinion of the district court (Pet. App. C1-C13) is reported at 684 F. Supp. 1417.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on September 2, 1988. A petition for rehearing was denied on September 28, 1988 (Pet. App. B1). The petition for a writ of certiorari was filed on December 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners filed this action under Federal Rule of Criminal Procedure 41(e), which the Clerk of the District Court placed on that

STATEMENT

1. On July 14, 1987, based on the affidavit of Special Agent Charles Holmes of the Internal Revenue Service (IRS), a United States Magistrate issued a search warrant for the premises of petitioner W.W. Rodgers and Sons Produce, Inc., a wholesale produce distributor located at 1015 South Harwood in Dallas, Texas. That affidavit detailed evidence of violations of federal criminal law, including conspiracy, 18 U.S.C. 371, income tax evasion, 26 U.S.C. 7201, and subscription to fraudulent income tax returns, 26 U.S.C. 7206(1). The violations allegedly arose out of a scheme involving kickbacks, money laundering, and skimming of cash proceeds. Pet. App. C1-C2; Gov't Amended Mem. in Supp. of Opp. to Mot. for Return of Property 1-2, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.).[2] On July 21, 1987, a team of IRS special agents executed the search warrant on petitioners' premises.[3] The agents seized a large volume of

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court's "miscellaneous docket" (Pet. App. A1). If treated as a criminal case, the petition for a writ of certiorari would be untimely under Rule 20.1 of the Rules of this Court. If treated as a civil case, the petition would be timely under Rule 20.2 of the Rules of this Court. See generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 302 & n.3 (6th ed. 1986). Because a motion for the return of seized property under Rule 41(e) is not technically a part of a criminal "case," the 60-day time limitation of Rule 20.1 appears to be inapplicable. In any event, petitioners' failure to comply with that filing deadline would not bar this Court's jurisdiction.

[2] Based on Special Agent Holmes' affidavit, the magistrate also issued search warrants for the premises of Barton Brothers Produce, another wholesale produce distributor located in Dallas, and for the persons of petitioner Roy Douglas Rodgers and Frank Barton. Pet. App. C1-C2. Roy Douglas Rodgers owns W.W. Rodgers and Sons Produce, Inc. and its affiliates. July 14, 1987, Tr. 26-27.

[3] On that day, IRS agents also executed the search warrants for Roy Douglas Rodgers, who was found at the Harwood address, and for

documents and also copied other records on microfilm. Pet. App. C1-C2; Gov't Amended Mem. in Supp. of Opp., *supra,* at 3.

2. a. On August 18, 1987, petitioners filed this action for the return of seized property under Federal Rule of Criminal Procedure 41(e) in the United States District Court for the Northern District of Texas.[4] Petitioners contended that the IRS agents' search and seizure of documents violated the Fourth Amendment because, among other reasons, the "purpose and execution of the search warrant [were] improper," the "search warrant was issued without sufficient evidence of probable cause," and the "search and seizure exceeded the scope of the search warrant" (Pet. C.A. Br. 3-4). Petitioners' principal prayer for relief sought an order requiring "the Government to

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Barton Brothers Produce and Frank Barton. Pet. App. C2.

W.W. Rodgers and Sons Produce, Inc., is the parent corporation of petitioners W.W. Rodgers and Sons Properties, Inc.; W.W. Rodgers and Sons Fruits and Vegetables, Inc.; Apple Trucking, Inc.; and Lettuce Invest, Inc., all of which share offices at the South Harwood address. See July 14, 1987, Tr. 26-27; Gov't Amended Mem. in Supp. of Opp. to Mot. for Return of Property 1-2, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.) We will collectively refer to Roy Douglas Rodgers and his firms as petitioners.

[4] Federal Rule of Criminal Procedure 41(e) provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

immediately return to [petitioners] the originals and all copies of all documents and records seized" (Pet. Mot. for the Return of Seized Property 20, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)).[5]

b. On October 2, 1987, the district court held an evidentiary hearing. After several witnesses testified, the parties reached an agreement concerning the inventorying of certain seized records. In light of the need to consider additional substantive and procedural matters, the district court adjourned the hearing to a later date. Before the court reconvened the hearing, however, a grand jury sitting in the Northern District of Texas began investigating

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[5] Petitioners' Rule 41(e) motion also sought an order requiring the government to provide photocopies "of all documents of which the Court does not order the originals returned," an order requiring the government "to provide in writing an explanation of why it is necessary to retain the original of any record seized pursuant to the Warrant," an order requiring the government "to furnish a specific inventory which describes on a document by document basis the records seized pursuant to the Warrant," an order "[g]ranting [petitioners] immediate access to the seized records," and an order "[a]warding [petitioners] costs, including reasonable attorneys' fees, incurred in seeking the return of the seized records" (Pet. Mot. for the Return of Seized Property 20-21, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)).

Franklin Barton filed a similar Rule 41(e) motion, in which he adopted the pleadings filed by petitioners. Michael J. Barton and Barton Brothers Produce later joined Franklin Barton's motion. Franklin Barton, Michael J. Barton, and Barton Brothers Produce appealed from the district court's order. They have not, however, sought further review of the court of appeals' order. See Pet. App. C2; R.E. 1-5 ("R.E." refers to the Record Excerpts filed with petitioners' brief in the court of appeals).

Roger Sutton, one of petitioners' employees who was detained by IRS agents during the July 21 search, joined petitioners' Rule 41(e) motion (Pet. App. C2). Sutton also has not sought further review of the court of appeals' order.

the matters that are the subject of the search and seizure petitioners were contesting. On November 17, 1987, the government accordingly requested the district court to stay indefinitely its resolution of petitioners' Rule 41(e) action pending completion of the grand jury's investigation. Pet. App. C2-C3.

Petitioners opposed the government's motion for an indefinite stay, contending that the district court's "power to act * * * cannot properly be terminated by the unilateral decision of the Government to authorize a grand jury investigation" (Pet. Mem. in Opp. to Gov't Mot. for Indefinite Stay 2, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)). Petitioners asserted that any stay would cause irreparable harm since they "will be compelled to endure the embarrassment and great extent of an extended investigation" (*id.* at 6). Finally, in urging the court not to defer ruling on their Rule 41(e) motion, petitioners emphasized the burden on them and stated that "the Government's investigative efforts may be unnecessary if [the court] ultimately rules in [petitioners'] favor" (*ibid.*).

c. On February 11, 1988, the district court issued an order holding that petitioners "have not adequately demonstrated even a colorable claim of irreparable injury" from a denial of the return of their property (Pet. App. C5 (footnote omitted)). Instead, petitioners had focused "primarily on another ineluctable element of a Rule 41(e) motion, the legality of the search and seizure" (Pet. App. C6).[6] The court recognized, however, that petitioners'

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[6] As the court observed, petitioners' "emphasis on the lawfulness of the search and seizure, as opposed to the equitable considerations that the court is to consider, raises the question whether [petitioners] have focused too narrowly on the aspect of the Rule that renders inadmissible at trial property that was seized unlawfully. While Rule 41(e) does

ability to plead "irreparable injury with certain specificity may hinge on whether the government makes available * * * copies of needed documents retained by the grand jury or returns documents that are not needed by the grand jury or by government prosecutors" (*id.* at C8). Accordingly, the court gave petitioners an opportunity to amend their pleadings in order to demonstrate the requisite irreparable harm (*id.* at C9).[7]

3. Petitioners filed an amended motion, and the district court denied it. The court explained that the denial was without prejudice to petitioners' right to file a motion to suppress evidence under Fed. R. Crim. P. 12(b)(3), if petitioners should be indicted (Pet. App. C9-C13). It found that the government, in response to the court's earlier ruling, had provided petitioners with either microfilm copies or the originals of the seized records (*id.* at C11).[8] Petitioners nevertheless claimed irreparable injury from the fact that they might need to wait several years (assuming the grand jury returned an indictment) before the courts would finally resolve their constitutional challenge to the search and seizure. The district court recognized that "Fourth Amendment considerations

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so provide, the Rule was not intended to supplant Rule 12 as the principal vehicle for the suppression of evidence" (Pet. App. C7).

[7] In light of its disposition, the district court did not rule on the government's motion for an indefinite stay (Pet. App. C3).

[8] The government retained one box of records, which contained documented transactions between petitioners and various attorneys. That box remains under seal. The government asked the court to refer the matter to a magistrate for an in camera determination whether those records contain privileged communications. Pet. App. C12 n. 3.

should normally be deferred" and that petitioners have not made "a colorable showing of irreparable harm" (*id.* at C12, C13). As the court concluded, "[t]o the extent [petitioners'] allegations do not present Fourth Amendment-related contentions that are properly deferred, [petitioners] are unable to plead irreparable injury in the face of the government's willingness to make available * * * copies of all documents seized and to return certain original documents" (*id.* at C13).

4. The court of appeals dismissed petitioners' appeal (Pet. App. A1-A2). Relying on *DiBella* v. *United States,* 369 U.S. 121 (1962), it held that the district court's order denying the Rule 41(e) motion was not a final appealable order. *DiBella* holds that the denial of a preindictment motion under Rule 41(e) is appealable "[o]nly if the motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse* against the movant" (369 U.S. at 131-132). Since petitioners were the subjects of an ongoing grand jury investigation, *DiBella* precluded appellate review of the district court's order. Pet. App. A2.

ARGUMENT

1. Petitioners contend (Pet. 11-19) that the decision below conflicts with *DiBella* v. *United States, supra,* and with those courts of appeals decisions holding that the pendency of a grand jury investigation does not preclude appellate review of the denial of a Rule 41(e) motion. Contrary to petitioners' suggestion, however, the decision of the court of appeals in this case is consistent with *DiBella.* And to the extent the courts of appeals have divided over the second part of the two-part *DiBella* test, this case is not the proper vehicle for resolving that conflict, since peti-

tioners have failed to satisfy the first part of that test, *i.e.*, the requirement that the Rule 41(e) action must be solely for the return of property.

In *DiBella* v. *United States,* this Court held that an order denying a motion for the suppression and return of seized property is not appealable where an indictment intervenes between the filing of that motion and its disposition (369 U.S. at 131-132). The Court concluded that dismissal of such an action is immediately appealable "[o]nly if the [action] is solely for the return of property and is in no way tied to a criminal prosecution *in esse* * * *" (*ibid.*).[9] In applying that two-part test, however, the courts of appeals have divided over whether an ongoing grand jury investigation sufficiently ties a Rule 41(e) action to a criminal prosecution in order to preclude immediate appellate review. The majority view, following the principles of *DiBella*, holds that a grand jury investigation makes appellate review unavailable because "allowance of an appeal in such circumstances would interfere with the grand jury proceedings and allow piecemeal appeals." *Church of St. Matthew* v. *United*

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[9] The Court reasoned:

> Presentations before * * * a grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion must be treated as "but one step in the criminal case preliminary to the trial thereof."

369 U.S. 131 (quoting *Cogen* v. *United States*, 278 U.S. 221, 227 (1929)).

States, 845 F.2d 418, 419 (2d Cir. 1985) (per curiam).[10] On the other hand, several courts of appeals have held that the existence of a grand jury investigation, without the return of an indictment, does not prevent immediate appellate review under *DiBella*. *E.g., In re 949 Erie Street, Racine, Wis.*, 824 F.2d 538, 540-541 (7th Cir. 1987) ("motion for return of property is not tied to a criminal prosecution until the criminal process shifts from investigatory to accusatory; that is, until charges have been filed").[11]

Contrary to petitioners' contention (Pet. 14), this case does not offer the Court an opportunity to resolve the lower courts' disagreement over the second part of the *DiBella* test. All courts agree that the dismissal of a Rule 41(e) action is appealable only if both parts of the test are satisfied, and petitioners do not challenge that accepted view.[12] In this case, however, petitioners' action fails to

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[10] Accord *In re Grand Jury Proceedings*, 831 F.2d 222, 224 (11th Cir. 1987) (per curiam); *United States* v. *Regional Consulting Services*, 776 F.2d 870, 874 (4th Cir. 1985); *United States* v. *Furina*, 707 F.2d 82, 84 (3d Cir. 1983); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 896 (1st Cir.), cert. denied, 449 U.S. 891 (1980); *Church of Scientology* v. *United States*, 591 F.2d 533, 535-536 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Glassman*, 533 F.2d 262, 263 (5th Cir. 1976).

[11] Accord *First Nat'l Bank of Tulsa* v. *United States Department of Justice*, No. 88-1623 (10th Cir. Jan. 4, 1989), slip op. 10; *In re Search Warrants (Executed on Jan. 23, 1983)*, 750 F.2d 664, 667-668 (8th Cir. 1984); *Sovereign News Co.* v. *United States*, 690 F.2d 569, 571 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

[12] See, *e.g.*, *Church of St. Matthew* v. *United States*, 845 F.2d at 419; *In re 949 Erie Street, Racine, Wis.*, 824 F.2d at 540-541; *United States* v. *Regional Consulting Services*, 766 F.2d at 873-874; *In re Search Warrants (Executed on Jan. 23, 1983)*, 750 F.2d at 666-668; *In re Grand Jury Proceedings*, 716 F.2d 493, 495 (8th Cir. 1983); *United States* v. *Furina*, 707 F.2d at 84; *Imperial Distributors, Inc.* v. *United States*, 617 F.2d at 895-896.

satisfy the first part of the *DiBella* test, because their Rule 41(e) motion was not filed "solely for the return of property" (369 U.S. at 131-132).

Here, the government provided petitioners with either microfilm copies or the originals of the seized records (Pet. App. C11). Under these circumstances, it is clear that petitioners' continued effort to obtain the remaining originals and the government's retained copies of returned records is nothing more than a motion to suppress the contents of those records. See *Warden* v. *Hayden,* 387 U.S. 294, 305 (1967); *In re 949 Erie Street, Racine, Wis.*, 824 F.2d at 541 (dismissing appeal); *United States* v. *Regional Consulting Services,* 766 F2d 870, 873-874 (4th Cir. 1985) (dismissing appeal); *Imperial Distributors, Inc.* v. *United States,* 617 F.2d 892, 895-896 (1st Cir.) (dismissing appeal), cert. denied, 449 U.S. 891 (1980); compare *In re Grand Jury Proceedings,* 716 F.2d 493 (8th Cir. 1983) (denial of Rule 41(e) motion appealable because motion primarily sought return of original documents that were vital to movant's operation of business). Accordingly, petitioners' Rule 41(e) motion was primarily, if not solely, designed to prevent the government from using the evidence in any current or future criminal proceedings.

Petitioners effectively conceded that point by acknowledging that "the Government's investigative efforts may be unnecessary if [the district court] ultimately rules in [their] favor [on the Rule 41(e) motion]" (Pet. Mem. in Opp. to Gov't Mot. for Indefinite Stay 6, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)). That point was also clear from petitioners' response to the district court's invitation for petitioners to state the irreparable injury that they expected to suffer from the denial of Rule 41(e) relief. They claimed the injury that they would suffer was that they "will be compelled

to endure the embarrassment and great extent of an extended investigation" (Pet. Mem. in Opp. to Gov't Mot. for Indefinite Stay 6, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.)). By basing their claim of injury on the prospect of a lengthy criminal investigation, petitioners essentially conceded that suppression of the evidence was the primary, if not the sole, purpose underlying their continued litigation of the Rule 41(e) motion.

To be sure, petitioners' original Rule 41(e) motion stated that petitioners "do[] *not* seek, at this time, a ruling that the property which is ordered returned to [their] possession is not admissible evidence" (Pet. Mot. for the Return of Seized Property 1, *In re: Search Warrant Issued July 14, 1987,* Misc. No. 2433-D (N.D. Tex.) (emphasis in original)). But petitioners' continued demand for court-ordered relief, even after the government provided petitioners with the originals or copies of the seized records, see Pet. App. C11, demonstrated that petitioners' true reason for maintaining their Rule 41(e) action was to obtain an order suppressing the seized evidence for purposes of any future hearing or trial. Such an order would be the consequence of prevailing on the Rule 41(e) motion, because the current version of Rule 41(e) provides that "[i]f the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial" (Fed. R. Crim. P. 41(e)). See, *e.g., In re 949 Erie Street, Racine, Wis.,* 824 F.2d at 541; *Standard Drywall, Inc.* v. *United States,* 668 F.2d 156, 158-159 (2d Cir.), cert. denied, 456 U.S. 927 (1982); *Imperial Distributors, Inc.* v. *United States,* 617 F.2d at 895-896; *United States* v. *Glassman,* 533 F.2d 262, 263 (5th Cir. 1976).[13] In sum, the

[13] The Criminal Rules Committee of the Judicial Conference has proposed an amendment to Rule 41(e) that will in all probability avoid

district court's dismissal of petitioners' action therefore was not appealable under any circuit's application of the two-part *DiBella* test.[14] Consequently, this is not an appropriate case for resolving the courts of appeals' differing applications of the second part of the *DiBella* standard.

In any event, further review of petitioners' Rule 41(e) action would be premature. This is not a case "where denial of immediate review would render impossible any review whatsoever of an individual's claims" (*United States* v. *Ryan,* 402 U.S. 530, 533 (1971)). The term of the grand jury is fixed in duration. See 18 U.S.C. 3331; Fed. R. Crim. P. 6(g). If the grand jury does not return an indictment, the property ordinarily would be returned to petitioners. If not, they could initiate a new action for its return. If, on the other hand, the grand jury does return an indictment, a criminal trial would follow shortly thereafter (see 18 U.S.C. 3161 *et seq.*), at which time petitioners could file a motion to suppress evidence under Fed. R. Crim. 12(b)(3) based on the same allegations that are raised in their Rule 41(e) motion. The district court's ruling on that motion would then be reviewable after convic-

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the problems presented in this case. See 109 S. Ct. LXVII-LXX (1988). The proposed amendment will omit the provision in the current rule requiring a suppression order to accompany any order returning property under Rule 41(e). If the proposed Rule is adopted, it will discourage the practice of filing preindictment motions under Rule 41(e), because the true purpose underlying many of those motions—to obtain suppression of the evidence—will no longer be a part of the relief granted to a successful movant.

[14] Petitioners further contend (Pet. 15-17) that the court of appeals' decision conflicts with *Perlman* v. *United States,* 247 U.S. 7 (1918), *Burdeau* v. *McDowell,* 256 U.S. 465 (1921), and *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931). That asserted conflict is illusory because none of those decisions involved a district court's consideration of a Rule 41(e) motion where the movant was subject to a pending grand jury investigation.

tion. See *United States* v. *Furina,* 707 F.2d 82, 84 (3d Cir. 1983); *Standard Drywall, Inc.* v. *United States,* 668 F.2d 156, 158 (2d Cir.), cert. denied, 456 U.S. 927 (1982).

2. Petitioners further contend (Pet. 17-24) that the court of appeals erred in holding that 28 U.S.C. 1331 does not provide district courts with jurisdiction over Rule 41(e) actions. But the court of appeals dismissed petitioners' appeal solely on the ground that the failure to satisfy the two-part *DiBella* test precluded appellate review (Pet. App. A2).[15] For that reason, there is no occasion for this Court to address petitioners' Section 1331 claim, including their subsidiary allegations that the district court erred in requiring them to allege irreparable harm and that the courts below improperly applied the doctrine of "anomalous jurisdiction" (Pet. 21).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JAMES I.K. KNAPP
Acting Assistant Attorney General
ROBERT E. LINDSAY
GAIL BRODFUEHRER
Attorneys

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[15] The court of appeals' statement in passing that the "district court's order here does not rest wholly or even partially on jurisdictional grounds" (Pet. App. A2 n.1) did not constitute a separate ground for dismissing petitioners' appeal under *DiBella*.

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